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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 527

JOHN BATISTA CONTE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Now comes Marvin A. Koblentz, on behalf of the Petitioner, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered August 4, 1965, affirming the judgment of conviction of Petitioner.

OPINION BELOW.

The opinion of the Court of Appeals is set forth in the Appendix, *infra*, p. 24, and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1965 (App., *infra*, page 28). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED.

U. S. C. A. Title 18, Sec. 1343:

"Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of fraud or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice * * *."

Constitutional Amendments:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation * * *." United States Constitution Amendment VI.

QUESTIONS PRESENTED.

1. Whether the District Court has jurisdiction over the Petitioner in the light of the lack of evidence of the Petitioner's knowledge of a scheme to defraud which had originated within the jurisdiction of the District Court.

2. Whether the evidence was sufficient to justify the conviction of the Petitioner that he participated in a scheme and artifice to defraud purchasers of bonds of North Star Oil Ltd., a corporation existing under the laws of the Dominion of Canada, for the purpose of obtaining money and property under false and fraudulent pretenses by claiming said bonds were available at a discount because the owner did not know their true value whereas the Petitioner *knew* the said bonds to have been forged and falsely made. (Emphasis supplied.)

3. Whether Petitioner was deprived of a fair trial by newspaper coverage during the trial which contained highly prejudicial information concerning the Petitioner.

STATEMENT OF CASE.

During the month of February, 1959, a certain quantity of North Star Oil Ltd. bonds mysteriously disappeared from the vault of the Toronto General Trust Bank, the transfer agent, in Montreal, Canada (14a). The aforementioned bonds at the time of their disappearance were not countersigned by an authorized Trust Official (13a).

During the month of July, 1962 one Gerald Patrick Dooley, originally one of the three persons indicted in the within case, conferred with Charles Vincent Cullinan about the availability of North Star Oil Ltd. bonds at a discount price and subsequent thereto delivered Bond No. 1639 to Cullinan (17a). Cullinan returned the bond to Dooley when a broker friend informed him that his firm,

Russell & Co., were not interested in handling the transaction due to the small commission that would be realized (15a).

Subsequently Cullinan approached Dominic Visconsi, a wealthy Cleveland businessman, and revealed to him the opportunity to buy the said bonds with a $10,000.00 down payment and the balance 30 days after delivery. Visconsi offered to "loan" him $10,000.00 for the down payment provided that he (Visconsi) could first have the bonds checked as to their value and marketability (17a, 26a). Cullinan than contacted John Jacob Samarin, one of the original defendants, and without revealing to Samarin, of the aforementioned arrangement between Cullinan and Visconsi, requested Samarin to obtain a North Star Oil Ltd. bond. Upon Cullinan receiving said bond from Samarin, without Samarin's knowledge, Cullinan delivered the bond to Visconsi (16a, 20a).

Visconsi proceeded to give the bond to his broker Mr. Burt Cliff of Francis I. DuPont & Co., Cleveland office, with instructions to ascertain the value and marketability (21a, 26a). Visconsi's sole purpose being in the event the bonds had a ready market available he would make the down payment requirement, $10,000.00, available to Cullinan (26a).

DuPont & Co. sent a teletype message to their New York office and in reply to their query a teletype message was sent back to the Cleveland office (28a). By teletype arrangements were made for the sale of the bonds through the brokerage firm of Davidson & Co., Toronto, Canada, at a net price of $49,874.00 (9a, 10a).

Upon ascertaining that a market was available to sell the Bonds at approximately $5,000.00 more than their cost, Visconsi not only agreed to advance the $10,000.00 down payment but also put his private plane and pilot at

Cullinan's disposal for the flight to Toronto, Canada to pick up the bonds and deliver them to Davidson & Co. (18a).

Cullinan upon being advised as to the sale arrangements by Visconsi, through DuPont & Co. and Davidson & Co., then contacted Samarin and instructed him to proceed to Toronto, Canada for the sole purpose of arranging for the sale of the Bonds to Cullinan (24a, 25a). There is no evidence that Samarin had any knowledge of Visconsi or the arrangements made by DuPont & Co. and Davidson & Co., for the sale of said bonds (27a, 29a).

Cullinan testified that not only did he direct Samarin to proceed to Toronto, Canada to arrange for the purchase of said Bonds but he also advanced Samarin funds to defray expenses and arranged for Samarin to rent a Hertz automobile by using Cullinan's credit card.

Upon Samarin's arrival in Toronto, Canada on August 10, 1964, he placed a call to Cullinan and the following day Cullinan placed a call to Samarin instructing Samarin to return to Cleveland (24a).

On August 13, 1962, Cullinan again instructed Samarin to travel to Toronto, Canada, to arrange for the purchase of said bonds in Cullinan's behalf (24a). Cullinan arrived by Air, in Visconsi's private plane, in Toronto, Canada on the following day, August 14, 1962, and had dinner with Samarin and the petitioner John Conte, who was introduced by Samarin that day (21a, 22a).

The following morning, August 15, 1962, Samarin arrived in Cullinan's room in the Lord Simcoe Hotel at which time Samarin executed a receipt prepared by Cullinan i.e. "I, John Samarin for the sum of $10,000.00 herewith sell and assign all title and right to 120 North Star Bonds. * * * I guarantee said bonds to be valid * * * received $10,000.00 bal _____ $5,000.00 finders fee to be retained by Charles V. Cullinan /s/ John Samarin"

(16a, 22a). Shortly thereafter the petitioner John Conte arrived with two shopping bags containing the 120 North Star Oil Ltd. bonds and Cullinan handed Conte the $10,000.00 (22a).

Cullinan the very same day then delivered the bonds to Mr. John Labbett at Davidson & Co. and received a check made payable to the Francis I. DuPont & Co. in the amount of $49,874.00 in payment for said bonds (9a, 10a). The following day Davidson & Co., upon learning that the aforementioned bonds were the same as those bonds which disappeared in 1958 and the countersignature was forged (10a) promptly notified DuPont & Co. not to pay out on their check. Cullinan presented the check to Mr. Cahill, Manager at DuPont & Co., the following day and wanted the check cashed and was notified that the bonds contained forged countersignatures and had been stolen (30a, 39a). Cullinan testified that he contacted Samarin in Cleveland, Ohio and revealed to him that he was notified that the bonds were stolen and forged and Samarin expressed disbelief that the bonds were not genuine (19a). Upon cross examination Cullinan testified he believed Samarin's expression of surprise and disbelief then and still believes him (20a).

At the onset of the trial the Government upon motion moved to dismiss the indictment as to the Defendant Gerald Patrick Dooley.

A motion in behalf of the petitioner to dismiss Counts One and Nine of the Indictment was granted.

During the course of the trial before a Jury an article highly prejudicial to the petitioner appeared in The Cleveland Press, newspaper with the largest circulation in the State of Ohio. A timely motion was made to withdraw a Juror and declare a mistrial was denied (32a, 33a).

From a guilty verdict this appeal is made.

REASONS FOR GRANTING WRIT.

1. Whether the District Court has jurisdiction over the Petitioner in the light of the lack of evidence of the Petitioner's knowledge of a scheme to defraud which had originated within the jurisdiction of the District Court.

It is a well settled principle of law that jurisdiction is a primary requisite in the prosecution of civil as well as criminal matters.

There can be no judicial power without jurisdiction, and judicial power can be exercised only within the scope of jurisdiction. 15 *O. Jur.* 2d 359.

In the case of *Bentiniglia v. Aderhold*, 51 F. 2d 308, the court stated, "Where the court lacks jurisdiction over the offense, trial and conviction are void."

The petitioner was one of three defendants originally charged in a nine count indictment with violation of Title 18, Sec. 1343, Sec. 2314, Sec. 371 of the United States Code. In the beginning of the trial counsel for the defendants filed a motion for the dismissals of counts one and nine of the aforementioned indictment, said counts dealing with the violation of Sec. 2314, i.e. transportation of forged and falsely made securities of a foreign corporation and count nine in violation of Sec. 371, the conspiracy statute of the United States Code. Upon submission of briefs and oral argument, the court granted the defendants' motions for the dismissals of counts one and nine of said indictments, leaving into issue the alleged violation of Sec. 1343 as alleged in counts two through eight of the original indictment.

Title 18, Sec. 1343, of the United States Code provides as follows:

> "Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of fraud or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned not more than five (5) years or both." U. S. C. A. Title 18, Sec. 1343.

The Court's attention is directed to the second count of said indictment which alleges that on the 6th day of August, 1962, the defendant did unlawfully, wilfully, and *knowingly* cause to be transmitted in interstate commerce by means of interstate wire, from Cleveland, Ohio in the Northern District of Ohio, Eastern Division, to New York, New York—a certain teletype message from the office of Frances I. DuPont in Cleveland, Ohio, to the offices of Frances I. DuPont in New York, New York.

Count three pertains to a similar offense that the defendants *knowingly* caused to be transmitted in interstate commerce on the 7th day of August, 1962, a wire from the office of Frances I. DuPont in Cleveland, Ohio, to the office of Frances I. DuPont in New York, New York. (Emphasis supplied.)

Count four again alleges a similar offense that on the 7th day of August, 1962, the defendants *knowingly* caused to be transmitted in interstate commerce by means of interstate wire from New York, New York—a teletype message from the office of Frances I. DuPont in New York, New York to the office of Frances I. DuPont in Cleveland, Ohio. (Emphasis supplied.)

Count five alleges a similar offense that the defendants *knowingly* caused to be transmitted in interstate commerce a wire from Frances I. DuPont from Cleveland,

Ohio, to Davidson & Company of Toronto, Canada. (Emphasis supplied.)

Count six alleges a similar offense that on the 7th day of August, 1962, the defendants *knowingly* caused to be transmitted in interstate commerce a wire from Davidson & Company of Toronto, Canada, to Frances I. DuPont of Cleveland, Ohio. (Emphasis supplied.)

Count seven alleges on the 9th day of August, 1962, the defendants caused to be transmitted in foreign commerce by means of a telephone wire from Toronto, Canada, to Lakewood, Ohio from John Jacob Samarin to Charles Vincent Cullinan in Lakewood, Ohio.

Count eight alleges a similar offense that on August 10, 1962, the defendants *knowingly* caused to be transmitted in foreign commerce by means of a telephone wire from Toronto, Canada, to Lakewood, Ohio, from John Jacob Samarin to Charles Vincent Cullinan. (Emphasis supplied.)

That if there was a "scheme" and artifice to defraud purchasers of bonds of North Star Oil, Ltd., a Canadian Corporation which resulted in the transmittal of teletype and telephone messages as enumerated in counts two through counts eight of the indictment said scheme and artifice to defraud was not devised by the defendant, John Jacob Samarin, and the petitioner, John Batista Conte, but was actually devised and put into motion by the government's own witnesses, Charles Vincent Cullinan and Dominic Visconsi and in furtherance of said scheme at the behest of Charles Vincent Cullinan, who had even arranged for the rental of an automobile by John Jacob Samarin and advanced John Jacob Samarin funds for expenses, Samarin drove to Toronto, Canada to check on the availability of the bonds in question.

The government introduced the testimony of Charles

Vincent Cullinan which indicated that he was approached by one Gerald Patrick Dooley, during July of 1962 for the purpose of whether he would be interested in purchasing North Star Oil, Ltd. bonds, 4½ per cent sinking funds debentures, valued at Sixty Thousand Dollars ($60,000.-00) for a sum of Forty-five Thousand Dollars ($45,000.-00). Subsequently, according to the testimony of Cullinan, who indicated a desire to check one of the aforementioned bonds, Dooley delivered to Cullinan on July 18, 1962 a North Star Oil, Ltd. bond No. BD-1639 (19a). Cullinan in turn testified that the bond was returned to Dooley when a broker acquaintance of Cullinan had indicated that his firm, the Russell Company, would not be interested in handling the transaction due to the relative small commission involved (15a). Subsequently thereto, Cullinan upon his own initiative conferred with Dominic Visconsi, unbeknownst to the defendant, John Jacob Samarin (21a). According to the testimony of both Cullinan and Visconsi, Cullinan requested Visconsi to loan him Ten Thousand Dollars ($10,000.00) and Visconsi, a wealthy business man in the city of Cleveland, Ohio, indicated that he would make the loan available providing that he would have his own brokers, Frances I. DuPont and Company of Cleveland, Ohio, check the value of the bonds, and also as to their marketability (21a, 26a). Cullinan then sought out the defendant Samarin and obtained North Star Oil, Ltd. bond No. 1639 and without the knowledge of the defendant, Samarin, gave the bond to Mr. Visconsi (20a). Mr. Visconsi subsequently contacted his personal broker, Mr. Burt Cliff, a representative of the Frances I. DuPont and Company, and had him check out the aforementioned bond as to its price and marketability (26a). Subsequently, teletype messages more fully describe in counts number two, three, four, five and six were all caused at the

request of Cullinan and Visconsi, without the knowledge of the defendant, Samarin, for the sole purpose of a scheme devised by Cullinan and Visconsi to effectuate a quick sale of the bonds in question.

As a result of the teletype messages contained in the aforementioned counts, Visconsi advised Cullinan that his brokerage house, Frances I. DuPont and Company, had arranged for the sale of the aforementioned bond through the office of Davidson & Company of Toronto, Canada for a net amount of Forty-nine Thousand Eight Hundred Seventy-four Dollars ($49,874.00) (25a, 27a). Testimony was elicited from Mr. Robert A. Cahill, manager of the Frances I DuPont and Company, offices in Cleveland, Ohio, Mr. Burt Cliff of the Frances I. DuPont and Company, Mr. Visconsi's personal broker, and Mr. Edmond A. Retych, a former Frances I. DuPont and Company sales executive, who placed the order for the sale of the subject bonds at the request of Mr. Visconsi, that they had no knowledge of the defendant, John Jacob Samarin, and received no communication from him relating to the subject matter bonds, and they originally acted at the request of Mr. Visconsi, a customer, of their office who arranged for the sale of said bonds in the account name of Charles Vincent Cullinan (27a, 28a, 29a, 31a).

According to the testimony of the government's chief witness, Cullinan, he arranged for the defendant, Samarin, to lease a Hertz automobile, making available to him a credit card, and advanced funds to Samarin for expenses to go to Toronto, Canada to arrange for the purchase of said bonds which were to be subsequently sold as a result of arrangements made by Frances I. DuPont and Company and the Toronto firm of Davidson & Company (24a, 25a). The record fails to show that the defendant, Samarin, had any knowledge of the wires transmitted by Francis I. Du-

Pont and Company to the Davidson & Company of Toronto, Canada for the sale of said bonds and subsequently his sole purpose for being in Canada was at the request of Mr. Cullinan and the defendant, Samarin, can be cast in the light of being Cullinan's agent having absolutely no knowledge whatsoever of the "scheme" of Cullinan to dispose of the bonds immediately upon their receipt to the Davidson and Company brokerage firm in Toronto, Canada. There is no evidence whatsoever that Samarin derived any financial benefit according to Cullinan's own testimony, he was to pay the total sum of Forty-Five Thousand Dollars ($45,-000.00) for the said bonds, Ten Thousand Dollars ($10,-00.00) upon delivery and the balance thirty days after the date of delivery of the subject bonds in Mr. Samarin's room at the Lord Simcoe Hotel in Toronto, Canada, Mr. Samarin wrote out a receipt, to-wit: Received of Edward V. Cullinan, Ten Thousand Dollars ($10,000.00) balance, *less Five Thousand Dollars* ($5,000.00) *finder's fee* to be retained by Charles Cullinan.

Cullinan testified that soon thereafter, the petitioner, John Conte, whom he had met for the first time the evening before in Toronto, Canada (21a, 22a) subsequently arrived in the room in the Lord Simcoe Hotel carrying the subject bonds in two shopping bags and thereupon Cullinan gave the petitioner, John Conte, Ten Thousand Dollars ($10,000.00).

It is counsel's contention that as to the petitioner, John Conte, the record is clear that Mr. Cullinan met him for the first time in Toronto, Canada on August 14, 1962, that he was unknown to Mr. Visconsi, Mr. Cahill, Mr. Cliff, and Mr. Retych, all representatives of the Frances I. DuPont and Company and therefore he certainly had no knowledge whatsoever of the "scheme" of Cullinan and Visconsi which led to the transmission of teletype mes-

sages as outlined in counts two through seven for the sale of said bonds through the Davidson & Company in Toronto, Canada and there was no evidence whatsoever that he had knowledge of telephone messages between Toronto, Canada and Lakewood, Ohio from the defendant, Samarin, to Charles Vincent Cullinan enumerated in counts seven and eight of the indictment.

Taking Cullinan's own testimony that petitioner delivered the bonds in two shopping bags to the room of John Jacob Samarin at the Lord Simcoe Hotel on August 15, 1964 and Cullinan gave him Ten Thousand Dollars ($10,000.00), if any crime had been committed it is counsel for the appellants' contention that any crime committed thereof is subject to the laws of the Dominion of Canada and the United States has no jurisdiction, and therefore, the District Court has no jurisdiction to prosecute these defendants in this case.

It is quite apparent that the indictment does not mention any venue in this case, does not state where this crime was committed, and under the law, venue is an important point that must be proven in every criminal case. The sixth amendment of the Constitution of the United States provides "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and *district wherein the crime shall have been committed,* * * *." If a crime had been committed the venue of said crime pertaining to the appellants would be where the overt act occurred which was in Toronto, Canada.

Counsel for the petitioner respectfully contends that the United States District Court lacked jurisdiction over the offense and therefore the convictions should be set aside.

2. Whether the evidence was sufficient to justify the conviction of the Petitioner that he participated in a scheme and artifice to defraud purchasers of bonds of North Star Oil Ltd., a corporation existing under the laws of the Dominion of Canada, for the purpose of obtaining money and property under false and fraudulent pretenses by claiming said bonds were available at a discount because the owner did not know their true value whereas the Petitioner KNEW the said bonds to have been forged and falsely made.

Counts two through counts eight of the original indictment in which the Petitioner was subsequently convicted, are predicated upon a scheme or artifice to defraud which is set out in length in count two of the indictment, to-wit:

> "Prior to the 6th day of August, 1962, and continuing to the 7th day of August, 1962, the defendants, John J. Samarin, John Batista Conte, and Gerald Patrick Dooley, the defendants herein, devised and intended to devise a scheme and artifice to defraud purchasers of bonds of North Star Oil, Ltd., a corporation existing under the laws of the Dominion of Canada, which said bonds are more particularly described as follows, to-wit: One hundred twenty (120) North Star Oil, Ltd. bonds, 4½ per cent sinking funds debentures, series B due December 1, 1978, valued at Sixty Thousand Dollars ($60,000.00) * * * and for obtaining money and property by means of false and fraudulent pretenses and representations, *well knowing* at the time that the pretenses and representations would be false when made: that the aforesaid bonds of North Star Oil, Ltd. were legitimate bonds, that the bonds were only available in Toronto, Canada, that the bonds valued at Sixty Thousand Dollars ($60,000.00) could be purchased by placing Ten Thousand Dollars ($10,000.00) down and a balance

of Thirty-five Thousand Dollars ($35,000.00) paid within thirty days, that the aforesaid bonds could be purchased at this discount price because the present holders were not aware of the true value of the bonds, whereas in truth and fact the bonds had been stolen, forged, and falsely made and the defendants then knew the said bonds to have been forged and falsely made." (Emphasis supplied.)

It is the contention of counsel on behalf of the Petitioner that the evidence failed to prove that the Petitioner had any knowledge whatsoever that the subject bonds had been forged and falsely made and therefore, the intent to defraud element essential for conviction under the indictment was absent.

Title 18, Sec. 1343 of the United States Code under which the Petitioner had been charged is relatively a new statute and as a result of which despite a diligent search by counsel we have been unable to locate prior cases dealing specifically with the violation under Title 18, Sec. 1343 of the United States Code and thus respectfully represents to this Court that the *scienter* element which is a prime requisite in establishing a scheme or artifice to defraud, for obtaining money or property by means of fraud or fraudulent pretenses is analogous to that of Title 18, Sec. 472 of the United States Code, the pertinent part of which is as follows: "Whoever with *intent* to defraud passes, utters, publishes or sells * * * any false made, forged, counterfeit, or altered obligation of the United States * * *" (Emphasis supplied.) In *Marson v. United States*, 203 F. 2d 904 the court held "knowledge or belief of counterfeit character of money is an essential element of the crime of passing counterfeit money."

In the case of the *United States v. Kelly*, 186 F. 2d 598, the court stated,

"Mere passing of a counterfeit note is insufficient to show passer's knowledge that the note is counterfeit and his intent to defraud, as required for his conviction of passing and uttering a counterfeit note."

In the matter of *Price v. the United States*, 70 F. 2d 467, it was held:

"The naked act of possessing and passing counterfeit money does not necessarily give rise to a legitimate inference of guilty knowledge."

The government in order to establish the fact that the subject bonds were stolen and the transfer agent's signature subsequently was forged, called upon Mr. Gerald McCarthy, trust officer with the Toronto General Trust, who established the fact that the subject bonds mysteriously disappeared in 1958 from the vault of the Toronto General Trust bank (11a). Mr. McCarthy at great length testified that when an order was received for the purchase of one of the subject bonds he and three other persons acting as trust officers had authority to countersign said bond certificates (12a, 13a), the bonds that had mysteriously disappeared were not countersigned by any of the trust officers (12a). Under cross examination, Mr. McCarthy readily testified that the bonds in question were negotiable bearer bonds which once issued are of continuous nature in the world of commerce, i.e. unlike stock transactions where stock after each sale of stock certificates are returned to the transfer agent and a new certificate is issued in the name of the new buyer, the original bonds, like currency, remain in the hands of the purchaser; and a purchaser of a bearer bond in all probability and likelihood is unaware of the validity of the signature of the transfer agent and would have no knowledge whatsoever if the signature of the agent was forged and would have no knowledge of whether said bond was stolen security.

(13a.) Mr. McCarthy also testified although he has countersigned thousands of bonds, over a great period of years, it is unlikely that any subsequent holders of said bonds would have any knowledge as to the authenticity of the signature of the transfer agent; on the contrary, the holder of a bearer bond by the very nature of business practices assumes the genuineness and validity of a bond which comes in his possession (14a).

Mr. John Labbett of Davidson and Company, who had testified on behalf of the government that he is a manager of the Toronto brokerage firm of Davidson and Company and on about the 15th day of August, 1962, he issued a check made payable to the Frances I. DuPont and Company in the amount of Forty-nine Thousand Eight Hundred Seventy-four Dollars ($49,874.00) upon receiving the subject bonds from Charles Vincent Cullinan (9a, 10a). Upon cross examination Mr. Labbett, who has years of experience in the brokerage field, not only admitted that he was unaware that the signature of the trust officer appearing on said bonds was a forgery, but due to the fact that, *by chance,* one of his employees checked the bonds out with the transfer agent did they discover that the subject bonds were the same that had mysteriously disappeared from the vault of the Toronto General Trust bank in 1958 and they immediately notified the Toronto police department, and put a stop payment order on their check to the Francis I. DuPont and Company. (10a.)

Mr. Labbett under cross examination substantiated the fact that bearer bonds having a continuous nature in the world of commerce and unlike stock transactions, where the stock after each sale the stock certificates are returned to the transfer agent and a new certificate is issued in the name of the buyer, the original bearer bonds, like currency, remain in the hands of the purchaser; that a

purchaser of a bearer bond in all probability and likelihood is unaware of the validity of the signature of the transfer agent and would have no knowledge whatsoever if the signature of the agent was forged, and would have no knowledge whether said bond was a stolen security, (10a, 11a).

Mr. Labbett also under cross examination testified that it is not unusual for bonds to be sold or bought at a discount such as in the instant case. (11a.) Mr. Robert J. Cahill, manager of the Frances I. DuPont and Company, a government witness who had long experience in the financial world of years, also testified that bearer bonds have a continuous nature and are transferred from purchaser to purchaser and are negotiable (30a, 31a). Mr. Cahill also testified that it was not unusual for bonds to be offered for sale at a discount price, and that purchasers of bonds would be unaware of the authenticity of the signature of a transfer agent. (31a.)

Counsel for the Petitioner wished to call this Court's attention to the language in the second count of the indictment alleging "The present owner was not aware of the true value of the bonds * * *" whereas Charles Vincent Cullinan, the government's witness, had testified that he was not told why the bonds were being offered by the seller at a discount (16a).

Again calling this Court's attention to the receipt in the amount of Ten Thousand Dollars ($10,000.00) executed by the defendant, Samarin, indicating the balance due and guaranteeing the validity of said bonds (16a) certainly negates any knowledge that said bonds had been forged along with the testimony of Kenneth Gregory, witness for the government, who as assistant manager of the King Edward Hotel in Toronto, Canada testified that the defendants had registered at the King Edward Hotel using their own names and addresses.

In the matter of the *United States v. Ruffino*, 67 F. 2d 440, the court held in reversing the decision of the lower court when there was no evidence presented as to the counterfeit nature of a bill for a jury to draw a comparison as follows:

> "Mere passage of a counterfeit note in payment held insufficient to sustain a conviction of passing counterfeit note with intent to defraud, where a *prudent person* might well have believed the note was genuine, and there was no evidence as to the differences between counterfeit and genuine notes for a jury to be guided and permitted to legally draw a comparison which would have shown knowledge on the part of the defendant for his possession alone * * *." (Emphasis supplied.)

Counsel for the Petitioner contends that the test laid down by the above decision can be summed up by the court's phrase *"Where a prudent person might well have believed the note was genuine."* Certainly in the light of the testimony offered by the government's own witnesses, Mr. McCarthy, Mr. Labbett, and Mr. Cahill, that a purchaser of bearer bonds in all probability and likelihood is unaware of the validity of the signature of the transfer agent and would have no knowledge whatsoever if the signature of the agent was forged, and would have no knowledge whether said bonds were stolen security; the testimony of Mr. Gregory indicating that the Petitioner and the Co-Defendant Samarin had used their own names in registering at the King Edward Hotel and Samarin's action in guaranteeing the validity of said bonds, certainly negates any knowledge on the part of the Petitioner that he "knew the said bonds to be forged and falsely made." And thus the evidence does not support the verdict for which judgment should be reversed.

3. Whether Petitioner was deprived of a fair trial by newspaper coverage during the trial which contain highly prejudicial information concerning the Petitioner.

The question of the damage or of the propriety of the appearance of such an article in a newspaper in the middle of a trial is discussed hereunder.

It has been recognized that prejudice from newspaper comment of a kind with which the present annotation is concerned may be avoided, where the trial court gives the jury a cautionary instruction.

However it has also been said that in certain instances the probable influence of newspaper publicity is so obvious that the instructions by the trial court cannot be held to have *preserved inviolate the defendant's rights to a fair trial before an unbiased jury.* (*Marshall v. U. S.*, 360 U. S. 310.) (Emphasis ours.)

There appeared an article the size of four columns in a newspaper under the heading "Bargain Bond Sale Lures 'Good Samaritan' Into Trap." The article was written and appeared in the "Cleveland Press" in both the home and later editions, and it set forth what purports to be the writer's opinion of what this case is about. In this article, the writer took sentences out of context, and he stated things that were not true. He declared that the Government's chief witness was a "good samaritan," when the claim in the case before the jury was that the Government witness was part and parcel of a conspiracy involving the sale of these bonds. The article appeared at a time when the case was in progress, and neither side had rested, and evidence was being taken throughout the case. As an example, the second-last paragraph of the article is as follows:

"Conte is under constant guard by a U. S. Marshal. He was brought to Cleveland under a writ of habeas cor-

pus. He is under $50,000 bond in New York charged with attempting to sell $220,000 in counterfeit money."

The fact of the matter is that the Petitioner Conte was released and discharged by the New York authorities without even having to appear there, several weeks after the appearance of the article. It is also a fact that this had nothing to do with this case, and was no part of it, could not come into the jury's consideration under any condition, the jury would never have any knowledge of the episode which occurred in another jurisdiction. Counsel for the Petitioner contends that the article certainly violated the laws that the presumption of innocence is the bedrock of American criminal justice, and that it should not be diluted or selectively applied for any reason whatever. While no doubt the reason for the article is for the purpose of increasing circulation or for notoriety, it nevertheless is in the class of sensationalism, and is contrary to law, and no doubt has been very damaging because the jury of twelve was still in session when this article appeared in their homes and on the streets of the City of Cleveland.

This newspaper boasts that it is the largest newspaper in Ohio and that it has the most readers.

It goes without saying that news media must allow an accused to have a fair trial, and there does not appear that there can be an opposite view.

The fundamental problem which must be faced is how to protect fair trial without damaging the basic freedom of the press, which, properly applied of course, is itself one of the guarantees of fair trial.

In this instance, however, this newspaper in printing a four-column-size article during the trial of this case, misstated facts, expressed opinions, and contained damaging

statements and information that could not be introduced as evidence in this case, prejudicing the rights of the Petitioner to a fair trial.

A Motion was filed to withdraw a Juror and declare a mis-trial. In the Motion, aside from explaining that there was great publicity and improper statements and some false statements were made in that article, and that this article is undoubtedly prejudicial, it was also suggested to the Court in the following language:

> "The Court is respectfully urged to summon the jury into his chamber one by one, and inquire if they have seen the article."

This method was followed in the case that finally reached the U. S. Supreme Court, which is known as *Howard R. Marshall vs. U. S. A.*, 360 U. S. 310, 79 Supreme Court 1171.

After filing this Motion, a conference was held between Counsel and the Court, and the question was discussed at length of the propriety of calling each juror into the court's chamber where the questions could be asked in private instead of permitting these questions to be asked of the jury en banc. The court, however, after returning to the court room and when the jury was sitting in its box, began to ask each juror if he had read the article in the Cleveland Press, and each one denied having seen or read the article. One juror, however, named Mrs. Madelyn Maier, told the Judge that she had received a telephone call from out of the City from a friend, who inquired as to whether the case that she was reading about in the Cleveland Press was the very one that she was a juror on. Evidently this out-of-town friend read it in the Cleveland Press the very same day, and the juror did not say what answer she made, although she admitted talking about it to another juror (R. 381).

The mere fact of asking each juror in the presence of the others whether they had discussed or read such an article was in itself not proper in an instance of this kind. counsel contends that the method discussed in the above Supreme Court case 360 U. S. 310 was the proper method to follow, and that the Court should have done so instead of handling the matter the way it did to insure the petitioner's being afforded a fair trial.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARVIN A. KOBLENTZ,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided August 4, 1965.)

Before Weick, Chief Judge, Miller, Circuit Judge, and Mathes, Senior District Judge.*

WEICK, Chief Judge. Appellants Conte and Samarin were convicted by a jury in the District Court on six counts of an indictment charging them with devising a scheme to defraud purchasers of corporate bonds which had been stolen, forged and falsely made, and executing it by transmitting wire communications in interstate and foreign commerce, in violation of 18 U. S. C. § 1343. They were sentenced to five years' imprisonment on each count, to run concurrently. The appeal of Samarin was dismissed pursuant to a stipulation of counsel. Only the appeal of Conte was argued and submitted to us for consideration.

In February, 1959, a number of bonds of North Star Oil, Ltd., a Canadian corporation, disappeared from the vaults of its transfer agent, Toronto General Trust Bank, in Montreal, Canada. The bonds were payable to bearer but had not been counter-signed by an authorized official of the bank.

The indictment related to one hundred twenty of the bonds, valued at $60,000. The counter-signature of the transfer agent had been forged on the bonds.

Appellant Samarin approached Charles Vincent Cullinan in Cleveland, Ohio, in June or July, 1962, for the purpose of selling these bonds. Cullinan finally agreed to purchase the bonds from Samarin for $45,000., of which

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* William C. Mathes, Senior District Judge of the United States District Court for the Southern District of California, sitting by designation.

$10,000. was to be paid in cash, and the balance of $35,000., less a finder's fee to be retained by Cullinan, was to be paid within twenty days.

Cullinan arranged to borrow the $10,000.-down payment from Dominic Visconsi, a wealthy business man in Cleveland. Visconsi contacted the Cleveland office of Francis I. duPont Co., brokers, to ascertain the value and marketability of the bonds. Teletype messages were sent back and forth between the Cleveland office and the New York office of duPont Co., which resulted in the latter office making arrangements with Davidson & Co., brokers of Toronto, Canada, for the sale of the bonds for $49,874. Cullinan intended to purchase the bonds from Samarin and to sell them at a profit through duPont Co. The bonds were selling at a discount at that time.

Samarin went to Toronto to obtain the bonds. While there he had several long distance telephone conversations with Cullinan, who was in Cleveland. Some of the calls were placed by Samarin from his hotel room in Toronto, and others were placed by Cullinan. Conte was in Toronto when long distance telephone conversations between Samarin and Cullinan took place. He and Samarin stayed at the same hotel. The telephone conversations resulted in Cullinan going to Toronto to close the purchase, traveling in a private plane belonging to Visconsi.

Several days after Cullinan's arrival in Toronto, Samarin and Conte went to his hotel room. Conte had the bonds in two shopping bags. Conte delivered the bonds to Cullinan, who paid him $10,000. in cash. Samarin gave Cullinan a receipt for the cash and an assignment of and warranty of title to the bonds. Cullinan then took the bonds and delivered them to the brokerage office of Davidson & Co. in Toronto and secured a check in the amount of $49,874., payable to Francis I. du Pont Co. Davidson & Co.

later contacted the transfer agent bank and learned that the bonds had been stolen. It then stopped payment on its check to duPont Co.

Neither Samarin nor Conte made restitution to Cullinan for the $10,000.-down payment.

In the indictment the use of the wires in sending the teletype and telephone messages was charged in separate counts.

Conte contended that the offense charged against him was committed in Canada, and that the District Court in Northern Ohio had no jurisdiction. The scheme, however, was devised in Cleveland and in executing it wires were used in sending teletype messages to New York, and from New York to Cleveland. Telephone calls were made from Cleveland to Toronto and from Toronto to Cleveland. The victim resided in Cleveland. In our opinion the District Court had jurisdiction. *United States v. Whiting,* 308 F. 2d 537 (C. A. 2, 1962), cert. denied 372 U. S. 909; *United States v. Fassoulis,* 185 F. Supp. 138 (S.D. N.Y., 1960) aff'd. 203 F. 2d 243, cert. denied 368 U. S. 919.

Conte further contended that the evidence was insufficient to support the verdict. He argued that he had no knowledge that the wires would be used in the illegal transmission of messages in interstate and foreign commerce. He alleged that his participation in the scheme occurred subsequent to the use of the wires and after it had been devised.

In considering this issue the evidence, as well as inferences, must be viewed in the most favorable light to the Government. *Battjes v. United States,* 172 F. 2d 1 (C. A. 6, 1949).

Conte had possession of the stolen bonds. He carried them in shopping bags to the hotel room of Cullinan in Toronto, where he received the cash down payment of

$10,000. The jury could infer from this evidence that both Conte and Samarin were participants in the scheme to defraud. At least Conte was an aider and abettor and was therefore equally guilty as a principal. *Roberts v. United States,* 226 F. 2d 464 (C. A. 6, 1955), cert. denied 350 U. S. 935.

The Court charged the jury in this respect as follows:

> "You are instructed, as a matter of law, that a person causes a message to be transmitted if he does an act with knowledge that the use of interstate or foreign wires for the transmission of messages will follow in the ordinary course of business, or where such use can reasonably be foreseen even though not actually intended.
>
> "You are further instructed that a person who is a party to an interstate or foreign [452] telephone conversation is transmitting sounds in interstate or foreign commerce even though the call may have been placed by another person calling him.
>
> "I further charge you that if you find from the evidence that the Defendants were acting together to carry out a scheme or artifice to defraud and that the acts of one caused an interstate or foreign transmission of messages in violation of the statute, then both would be responsible for such act. When a scheme to defraud is shared in by two or more, the act of each party in furthering the scheme is the act of and is attributed to each party of the scheme."

In our judgment this was a correct statement of the law. It was not necessary for the Government to prove that Conte or Samarin actually sent the messages over the wires. It is sufficient if the messages were the foreseeable result of their acts. *United States v. Houlihan,* 332 F. 2d 8 (C. A. 2, 1964) cert. denied 379 U. S. 828; *Roberts v. United States, supra.*

In any event, Count VIII was sustained by abundant evidence. Conte and Samarin were in the same hotel in Toronto at the time of the long distance telephone conversation between Cullinan and Samarin on August 10, which is charged in that count. Since Conte's conviction can be sustained on Count VIII and the sentences were to run concurrently, the validity of the conviction on the other counts need not be considered. *Hirabayashi v. United States,* 320 U. S. 81 (1943); *United States v. Salter,* __ F. 2d __ (C. A. 6, No. 15,917, 1965).

Appellant presented a further claim that he should have been granted a mistrial because of a prejudicial newspaper article. There was no evidence that any of the jurors read the article or knew its purport. It could not possibly have prejudiced Appellant.

Affirmed.

JUDGMENT.

(Filed August 4, 1965.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

s/ CARL W. REUSS,
Clerk.